

# RACE, REALISM AND CRITIQUE: THE POLITICS OF RACE AND *AFRIFORUM v MALEMA* IN THE (IN)EQUALITY COURT

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‘As black people we have suffered racism and ridicule for hundreds of years under a nonsensical, brutal apartheid system. Yet today, barely 17 years post-independence, we are being accused of being racist against those that were racist. Everything we do and say is brought to the courts so that it can be legally banned, just like the Shoot the Boer song, which was interpreted to suit what the rich, white people wanted it to be. This shows that we still have not yet transformed. Apartheid, it seems, has now been legalised. Being black and poor seems to be a curse.’ (Letters to the Editor ‘Whites still rule’ *Sunday World* 18 September 2011 at 15.)

‘The one who lodges a complaint is heard, but the one who is a victim, and who is perhaps the same one, is reduced to silence.’ (J-F Lyotard *The Differend: Phrases in Dispute* (1988) 10.)

## INTRODUCTION

In this note, I will employ the jurisprudential approaches of legal realism, critical legal studies (“CLS”) and critical race theory (“CRT”) in order to examine the ruling of Lamont J in *Afriforum v Malema* 2011 (6) SA 240 (EqC) (hereinafter *Afriforum v Malema*. All subsequent references to paragraphs in this note refer to this case). Although my real concern is with the manner in which this judgment reflects an impoverished ideological approach to race and law, I also hope to illustrate the importance of considering divergent philosophical perspectives in legal analysis of equality jurisprudence and rights discourse as a way of offering counter-‘seeings’ and counter-readings of the law. This critique will not be based on any niceties of technical legal analysis but rather on the way in which the court engaged with (or rather disengaged from dealing with) the ideological nature of law and the politics of race in post-1994 South Africa. My purpose is not to show why and how

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the judgment was wrong but rather to show why, because of how deeply formalism and racism remains embedded in the law and legal culture, law and legal reasoning continues to favour the socially and economically dominant members of society.

I will begin first by discussing the facts of the case with the purpose of highlighting key aspects of the ruling as well as those that stood out as being problematic. I will also repeat an argument by Pierre de Vos about the broadness of the hate speech provision (s 10) in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act') as well as the dangers of 'lawfare' or the judicialisation of politics (see Dennis Davis & Michelle le Roux *Precedent and Possibility: The (Ab)use of Law in South Africa* (2009) 185). Secondly I will refer to the key themes in legal realism, CLS and CRT that show why the judgment appeals to a notion of rationality and reasonableness associated with whiteness — a whiteness also informed by the subjective position of the judge himself. I will also discuss the possible 'false consciousness' of the decision as well as its lack of a race-critical perspective. In the process I hope to expose the underlying conservative ideology and racial politics behind the judgment despite its claim to protect the constitutional vision of unity and harmony in the 'new' South Africa.

In this way, I hope this discussion of the ruling places it in its broader context, namely the widening racial inequalities, the entrenched nature of white privilege, and the ongoing debate on socio-economic and political redress for the 'crime of apartheid' (see Karin van Marle 'Meeting the world halfway — The limits of legal transformation' (2004) 16 *Florida J of International Law* 662; Samantha Vice 'How do I live in this strange place' (2010) 41 *J of Social Philosophy* 323). In the end I lament that the true effect of this case (as well as the events subsequent to it) has been to confirm that that the struggle for racial equality goes on and that the pursuit of racial justice remains elusive.

## THE CASE

### *The complaint*

The complainant launched an application in the South Gauteng High Court (sitting as the Equality Court) asking the court to ban the African National Congress ('ANC') struggle song entitled dhubula 'ibhunu (literally translated as 'shoot the boer'). The complaint concerned not so much the song itself but the 'objectionable utterances' contained in it. The complainants averred that the song was being sung on numerous occasions by controversial politician and president of the ANC Youth League Julius Malema. The standard lyrics of the song are as follows:

'Ayasab' amagwala (the cowards are scared)  
 dubula dubula (shoot shoot)  
 ayeah dubula dubula (shoot shoot)  
 Ayasab' amagwala (the cowards are scared)

dubula dubula (shoot shoot)  
 ayeah dubula dubula (shoot shoot)  
 aw dhubuli 'ibhunu (shoot the boer)  
 dubula dubuala (shoot shoot)  
 aw dhubuli 'ibhunu (shoot the boer)' (Pierre De Vos 'On shoot the boer, hate speech and the banning of struggle songs' 6 (2010) *PULP Fictions* 13).

In the court's record, the lyrics chosen by the complainants as 'objectionable utterances' are as follows:

1. 'Awudubula (i)bhulu' (shoot the boer).
2. 'Dubula amabhunu baya raypha' (shoot the boers, they rape).
3. 'They are scared the cowards you should "shoot the boer" the farmer! They rob these dogs' (para 49).

Their application was based on s 10 of the Equality Act (read with s 16 of the Constitution of the Republic of South Africa), which provides that

'no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred'.

The complainant alleged that in light of the above provision, the 'objectionable utterances' (ie the song) could be reasonably construed as advocating hatred against Afrikaner farmers in particular and whites in general. In other words, the lyrics of the song communicate words based on ethnicity, culture and language that could reasonably be construed as having the clear intention to be hurtful to the relevant group (in this case Afrikaners and whites) and to incite harm and propagate hatred against them (para 49). Lamont J noted that despite the respondents' clarification that the term 'boer' symbolises the apartheid system of anti-black oppression and exploitation, the complainants were of the firm view that the song perpetuates systemic disadvantage and discrimination against Afrikaners and white farmers. Notwithstanding the plausible explanation that the song should not be taken literally, the complainants felt it is injurious to the dignity of Afrikaners and negatively affected their equal enjoyment of rights and freedoms. The respondents submitted however that liberation songs (such as dhubula 'ibhunu) are part of South African heritage and should be preserved as part of the commemoration of the struggle against apartheid and the celebration of the new freedoms purportedly enjoyed by all in the 'new South Africa'. As the judge noted:

'Liberation songs fulfil the prime requirement of a people's song because they are easy to sing, convey a feeling of solidarity which emanates from a situation of common experience and use words which form a powerful expression of emotional feelings of the persons who sing it.' (Para 54.)

The judge then went on to refer to numerous (mainstream and Afrikaans) newspaper articles reporting on Malema's singing of the song, as well as the

debates between the complainant and the respondent's organisation (the ANC and ANC Youth League) concerning the meaning and effect of the song, the publicity surrounding the song, the contexts in which it was sung, and 'controversial' statements made by Mr Malema concerning white economic power and land reform (paras 67–84). It is important to quote Lamont J at length in this regard:

'[T]here was a public uproar about Malema singing the song. The public had interpreted the words which he sang as being an attack upon a sector of the community namely the Boer/farmer who were loosely translated as being the Afrikaans-speaking sector of the community. That sector of the community was angered about the use of words which they saw as an incitement to people who heard the words to attack them. It is also apparent, and this is the evidence before me, that at that time farmers and white Afrikaans-speaking members of society who lived in isolated areas (on plots and farms) felt themselves at threat.' (Para 78.)

It should be emphasised that Lamont J added (*ibid*), albeit in parenthesis, that:

'[There is no evidence that anyone was in fact injured in consequence of the singing of the song. No one in fact appears to have suffered physical consequence as a result of the song being sung].'

This however did not change the complainants' arguments that the song constitutes hate speech and thus is a violation of the relevant provisions in the Constitution (s 16) and the Equality Act (s 10).

### *The ruling*

Lamont J began by dismissing the relevance of considering the occasion at which the 'objectionable utterances' were sung. He did this by arguing that because of the media coverage of the song, it was not only those who were familiar with the song's true, figurative meaning that would be exposed to it but the entire public. He preferred to consider the 'true audience' (ie the entire public) as opposed to the 'actual audience' (those attending the events where the song is to be sung, and who are presumably familiar with its real historically-rooted meaning). Therefore he found that the effect of the objectionable utterances should not be linked to the appropriateness of the occasion were it is sung because, in his view:

'All hate speech has an effect, not only upon the target group but also upon the group partaking in the utterance. That group and its members participate in a morally corrupt activity which detracts from their own dignity. It lowers them in the eyes of right minded balanced members of society who then perceive them to be social wrongdoers. In addition, to the extent the words are inflammatory; members of the group who hear them might become inflamed and act in accordance with that passion instilled in them by the words.' (Para 94.)

Here it seems clear that the judge had already decided that the song constituted hate speech. The judge continued (*ibid*) to consider whether in fact it is still a legitimate claim to argue that the song figuratively refers to an

ongoing struggle against racial domination and oppression and not to a specific and identifiable grouping in society:

'If it is claimed that the conduct was acceptable at a point in time and that a vested right exists to persevere with it on the basis of a legitimate expectation the simple answer is that times have changed. Change or transformation is hurtful. That hurt encompasses the loss of the exercise of rights which constitute violations of the Equality Act. . . . All genocide begins with simple exhortations which snowball. Words provide the stimulus for action, the means to numb the natural repugnance against hurting humans and the reward which is to be harvested after action. Words are powerful weapons which if they are allowed to be used indiscriminately can lead to extreme and unacceptable action.'

It was indeed the reference to genocide that made it clear that Lamont J considered the song not just (legally) to constitute hate speech, but also as having the (political) effect of inciting violence and perpetuating racial hatred (again, against Afrikaners and white farmers). This is underscored by his reference to whites as a minority group which is particularly 'vulnerable to discriminatory treatment and who in a very special sense must look to the Bill of Rights for protection' (para 35). Accordingly, he reasoned, courts have an even greater responsibility to protect and assist minorities.

He then went on to discuss the meaning of the song in a manner which indicated that he was clearly in favour of judging the song on the basis of its literal, English meaning, namely 'shooting the boer'. For Lamont J, the true intention of the person who utters the words is irrelevant; what matters is what those words mean 'to a reasonable listener' (para 109). He noted that words can have simultaneously different and conflicting meanings and can evoke different connotations to different 'portions' of society (ibid). The determination of the meaning of words is to be done with reference to that of a reasonable person with the common knowledge and skill of an ordinary member of society (ibid). He mentioned that even though words have different meanings, all plausible meanings are to be accepted and also that the aim is not to 'discover an exclusive meaning', but to find the meaning that the targeted group would attribute to the words (ibid). In other words, if a majority of middle class whites and Afrikaner farmers are of the view that the words are a direct instruction by Malema that they be shot for benefiting from apartheid or having supported the apartheid regime, such a meaning should be accepted as 'appropriate' (ibid).

Having ascertained such a meaning, and whether that meaning demonstrated a clear intention to commit hate speech and to promote violence and hatred, no justification (socio-historical context, intended meaning etc) can be used as a defence, since this does not change the inherent *nature* of the words as hate speech (ibid). Accordingly Lamont J ruled that the impugned objectionable utterances ('shoot the boer', 'they rape us', 'they are scared the cowards' and 'they rob these dogs') constituted hate speech. This is so because the words undermine the dignity of, and are discriminatory and harmful to, an identifiable grouping in society. He could have left his

judgment here but he nevertheless continued, insisting that those who are passionate about the song and who may wish to sing it in the future should

‘pursue new ideals and find a new morality. They must develop new customs and rejoice in a developing society by giving up old practices which are hurtful to members who live in that society with them’ (para 110).

Lamont J indicated that the Equality Act establishes new moral standards to which all members of society must adhere. The morality of society as envisaged in the Constitution, said Lamont J, dictates that people should desist from using the words or singing the song in any fashion or at any occasion whatsoever. He unproblematically names the value of uBuntu as being specifically relevant in this case (see D Cornell & N Mavangua (eds) *uBuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2011)). For Lamont J, it is in the spirit of uBuntu that the song should no longer be sung because of the ‘gross infringement of the target groups’ rights’ that it encourages (para 18). Consequently, the order of the court (para 111) is not merely limited to Mr Malema or the ANC (as personified by its members), but seems to also extend to everyone, including those who were not party to the proceedings:

‘Persons who are not parties to the proceedings must be dealt with by way of structuring the order so that society knows what conduct is acceptable. Persons who are aware of the line which has been drawn by the Court are as a matter of both law and uBuntu obliged to obey it. There may be no immediate criminal sanction. Their breach of the standard set by this Court will however surely result in the appropriate proceedings under the Equality Act being taken against them. Non participants are bound by orders setting such standards. The Equality Act contemplates that they will be so bound.’

#### *The effect of the ruling*

The judge ruled that ‘[Malema and the ANC] are interdicted and restrained from singing the song known as *Dubula Ibhunnu* at any public or private meeting held by or conducted by them’ (para 120). In other words, it does not matter whether the song is being sung at (a) a rally of former military veterans or only ANC members; or (b) at a funeral of a senior member of the party; or even (c) at closed meetings of the party such as its National Executive Committee meetings or branch meetings. The use of the words ‘public or private’, and the court’s disregard for context or for the intention behind the singing of the song, had the effect of permanently banning the song from ever being sung again by anyone. Given the sweeping nature of the ban, even those who were not party to the proceedings, such as for example members of a ANC-affiliated trade union, or members of the black community protesting against poor service delivery, or even high school students performing a skit during Freedom Day celebrations, would be compelled to comply with the standard set by the judgment and refrain from singing the song. Failure to do so results in a contravention of the hate speech provision and contempt of court.

*A critique of the ruling*

In De Vos's view, Lamont J's ruling will result in a 'radical limitation on the right to freedom of expression' ('Malema judgment: A re-think on hate speech needed' *Constitutionally Speaking* (12 September 2011) available at <http://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/>, accessed on 18 September 2011). For De Vos, it is not so much that the judge was, legally speaking, wrong in finding against the respondents but that the definition of hate speech contained in the Equality Act is 'extremely broad' (ibid). He goes so far as to argue that the 'hate speech provision in the Act is probably unconstitutional as it defines hate speech in much broader and open-ended terms than section 16 of the Constitution' (ibid). In essence, the Equality Act reduces hate speech to mere hurtfulness (For a view critical of hate speech regulation, see Judith Butler *Excitable Speech: A Politics of the Performative* (1997) 1–42, 43–70 and 127–164). Elsewhere De Vos, following Corder, also predicts that the broad definition in the Act might also lead to excessive litigation which in turn might result in the 'judicialisation of politics' or the 'politicisation of the law' (De Vos *PULP Fictions*, op cit at 18. See Hugh Corder 'Lessons from (North) America (beware the 'legalization of politics' and the 'political seduction of the law' (1992) 109 *SALJ* 204). In his view, reliance on courts to solve clearly political or ideological disputes may weaken the legitimacy of the courts and also impoverish the democratic culture in South Africa (ibid). De Vos went on to say:

'As the courts are perceived to be mostly only accessible to wealthy elites, . . . the judicialisation of our politics will lead to more social instability and a breakdown in legitimate representative and participatory government . . . Political mobilisation and action, not an over-reliance on the courts, is needed. . . .' (Op cit at 19–20.)

## RACE, REALISM AND CRITIQUE

Inow turn to focus on a critique of the manner in which the judge dealt with the racial dimensions of this case, and with how he engaged with the relationship between race and law, and law and politics, in post-apartheid South Africa. Tentatively, I will argue that the judge relied on a conservative and reactionary understanding of race and did not take into account the current dynamics of racial power and socio-economic privilege held by whites. The judge's decision is a classic example of rendering a concrete black point of view and lived experience irrelevant in favour of an abstract and reified approach that uncritically accepts white social norms as the standard for rationality and reasonableness. I will illustrate this below with reference to arguments advanced by the jurisprudential traditions of legal realism, CLS and CRT.

*Before Critical Legal Studies: Legal Realism*

'[A] trial is a cultural ritual, crime a cultural construct, and the court a cultural apparatus that represents and enforces the dominant culture's values and perspectives' (John L Caughey 'The anthropologist as expert witness: The case

of a murder in Maine' in Marie-Claire Foblets & Alison Dundes Renteln (eds) *Multicultural Jurisprudence* (2009) 321).

The starting point for my critique is the legal realist contention that legal cases (or put differently, the jurisprudence of the courts) are primarily produced by the discretionary and creative work of the judge concerned. Of course, this does not mean that judges have complete freedom in deciding cases, but the extent to which judges feel constrained by legal rules and make decisions on the basis of that perceived constraint also reflects where the judge stands on certain matters of law, legal ideology and politics. As Henk Botha reminds us, judicial decision-making is obviously grounded, first and foremost, in an interpretation of legal texts. However, the mode of interpretation and reasoning chosen to arrive at the one particular outcome is always influenced by the judge's own moral and political beliefs. Legal texts are not so determinate as to produce inescapable legal outcomes that are unaffected by normative assumptions ('Freedom and constraint in constitutional adjudication' (2004) 20 *SAJHR* 249). As Jeffrie G Murphy & Jules Coleman (*Philosophy of Law: An Introduction to Jurisprudence* (1990) 33) note:

'Since the "rules" allow the judge considerable free play, he or she can in fact decide the case in a variety of ways, and the way that is in fact adopted will be more of a function of such factors as the judge's psychological temperament, social class, and values than of anything written down and called rules.'

This has now become the standard realist approach to legal studies, in contrast to the formalist perspective which holds that judges decide cases exclusively on the basis of positive legal rules and rigorous legal reasoning. Realists seek to expose how the deciding factor in most cases is not necessarily the law but rather the judge's *own sense* of what is fair and just. In realist thought, the judge is a situated individual and is also a political and cultural actor in the case. The legal rules chosen and modes of legal reasoning employed by the judge are merely aimed at rationalising and legitimating, after the fact, the preconceived decisions of the judge, reached primarily on the basis of non-legal considerations. Among these non-legal considerations is the judges' own subject position: his own socio-cultural norms and values, political ideology, race, class, gender as well as the prejudices and predispositions shared by the social grouping and community of which he is a part.

This leads me to ask what a legal realist might have said about the more striking aspects of Lamont J's judgment: his undue reference to genocide, his emphasis on uBuntu and reconciliation, his preference for a certain conception of rationality and reasonableness, and his sweeping ban on the song even though the relief requested by the complainants was only for Mr Malema to be barred from singing the objectionable utterances. Naturally a legal realist would argue that it is not surprising that a white male judge would feel uncomfortable with the song. The legal realist would raise the very real possibility that the judge himself personally shares the concerns and fears of the applicants that the song constitutes hate speech and is a threat to *him*, *his* family and *his* community. This is evidenced by his hyperbolic emphasis on

the risk of a genocide against whites posed by the continued rendition of the song (paras 27, 62, 72, and 94) as well as his strong defence of white minority interests. The legal realist would note that the judge makes both claims despite acknowledging that no physical harm has resulted from the singing of the song and while conveniently forgetting that in South Africa, even though whites are the numerical minority, they wield much more socio-economic and ideological-political power (see George M Fredrickson *White Supremacy: A Comparative Study in American and South Africa* (1982) and Sampie Terreblanche *A History of Inequality* (2002)). So even though they are, statistically speaking, ‘minorities’, they are in the majority in every other sense of the word given the structural poverty, low social mobility, lack of adequate education, and generally poor standard of living experienced by blacks as a result of over 300 years of colonial apartheid (Kevin Durrheim, Xoliswa Mtose & Lyndsay Brown *Race Trouble: Race, Identity and Inequality in Post-Apartheid South Africa* (2011) 16–24).

Why then, despite evidence to the contrary, does Lamont J make the arguments about the risk of genocide against the white minority? A realist might explain this in two ways: first, by showing the extent to which his formalistic use of abstract concepts like equality, dignity and freedom masks his contestable choices and value judgments; and secondly, by exposing his reasoning as preconceived racial beliefs moulded in the language of the Equality Act, serving only to rationalise the unjustified fears of whites and maintain the ideal figure of the white heterosexual upper-middle class male as the standard definition for the ‘reasonable man’ (Christof Heyns ‘Reasonableness in a divided society’ (1990) 107 *SALJ* 279). This I would argue is particularly apparent in the judge’s preference for Afrikaans newspaper articles as confirmation of the general ‘public’s’ outrage at the song. Indeed, as Edwin Cameron (‘Judicial accountability in South Africa’ (1990) 6 *SAJHR* 251) has noted:

‘Judges do not enter public office as ideological virgins. They ascend to the bench with built-in and often strongly held sets of values, preconceptions, opinions and prejudices. These are invariably expressed in the decisions they give, constituting the inarticulate premises in the process of judicial reasoning.’

Seeing that less drastic measures and different jurisprudential approaches were available to Lamont J, one can only but agree with Cameron when attempting to locate the source of Lamont J’s ‘process of judicial reasoning’.

*CLS: Law as politics, false consciousness and the question of social power*

To the extent that legal realism focused only on the judge as an individual, the CLS movement focused more broadly on the entire legal system, highlighting its role in institutionalising unequal power relationships in society. The CLS project was aimed at exposing the law as a mechanism for social, economic, cultural and political domination, first in the sense of furthering the concrete interests of the dominant social grouping (mostly whites) and, secondly, in the sense of legitimating the existing order, thereby also normal-

ising the domination and oppression of the (mostly black) poor. CLS seeks to question in a radical way the traditional assumptions upon which legal doctrines are based. This includes rejecting the myth that law is a neutral, objective and apolitical system of rigid rules, and instead formulating an account of law as politics where law not only concealed existing power imbalances and inequalities, but also constructed and perpetuated them (see Roberto Mangabeira Unger 'The Critical Legal Studies movement' (1983) 96 *Harvard LR* 561; Mark Tushnet 'Critical Legal Studies: A political history' (1991) 100 *Yale LJ* 1515). The aim of a CLS approach, then, is to expose the hidden political biases of law and to show the ideological underpinnings of a legal rule or decision.

In the context of *Afriforum v Malema*, one could ask what are the hidden ideological and political beliefs at play in the judgment. One would do this with reference to the implicit standards and assumptions reinforced by this judgment. Clearly the judgment endorses a liberal approach to race and a formal view of equality. Traditional liberal racial principles are based on the claim that since law is autonomous and separate from social life, racism is incompatible with law. Law is seen as 'innocent' and detached from politics and for that reason, cannot be complicit in racial discrimination (P Fitzpatrick 'Racism and the innocence of law' in P Fitzpatrick & A Hunt (eds) *Critical Legal Studies* (1987) 121). This approach further portrays racism as an irrational attitude or hostile behaviour targeted towards an identifiable race group in society (or a member of that group), and thus effectively denies the insidious, systemic and institutional nature of racism and its historical specificity as an exploitative *anti-black* system that whites benefit and participate in. It follows that in such an approach, the *de jure* end of apartheid immediately means that all the problems of subjugation, oppression and marginalisation have also come to an immediate end. This can be seen from Lamont J's assertion that 'times have changed'.

That is to say that, for Lamont J, the system of anti-black racial domination and economic dispossession against which the song is directed, has disappeared forever and thus there is no reason to revive a song related to the demise of apartheid since apartheid (and presumably, the conditions created by it) is no more. For Lamont J, not only is singing the song a betrayal of the constitutional vision of reconciliation, it is also immoral and inimical to the value of uBuntu:

'Pursuant to the agreements which established the modern, democratic South African nation and the laws which were promulgated pursuant to those agreements, the enemy has become the friend, the brother. Members of society are enjoined to embrace all citizens as their brothers . . . It must never be forgotten that in the spirit of ubuntu this new approach to each other must be fostered. Hence the Equality Act allows no justification on the basis of fairness for historic practices which are hurtful to the target group but loved by the other group. Such practices may not continue to be practised when it comes to hate speech.' (Para 108.)

He further sought to distance those who sing the song (presumably blacks) from 'right minded balanced members' of society and also refers to the

singing of the song as a ‘morally corrupt activity’ (para 94). How would CLS explain this? What term would be used to describe the judge’s style of reasoning and his choice of words? I would argue here that the term is *false consciousness*.

The false consciousness thesis in CLS exposes how arguments that are presented as static and objective are really contingent and relative. It shows how because the law, as a system that legitimates dominant power and social relationships, is wrongly accepted as a normal and impartial institution, rules and decisions that purport to be derived from it are also wrongly accepted as neutral, independent and fair (See Peter Gabel & Duncan Kennedy ‘Roll over Beethoven’ (1984) 36 *Stanford LR* 42–4). Critical perspectives in legal analysis however open room for the contingency, relativity and subjectivity of things to become more visible, to become part of any legal enquiry. As Karin van Marle (‘To revolt against present sex and gender images’ (2004) 15 *Stellenbosch LR* 266) urges,

‘[w]e should never stop exposing how dominant power inequalities and ideologies influence, ever so subtly, public and legal discourse, how, because of a hidden belief, heavily loaded acts and expressions are seen as objective and neutral’.

The false consciousness thesis also illustrates that, contrary to what has been conventional wisdom in legal thought, when judges make decisions, those decisions are not derived from a natural, pre-political and non-ideological interpretation of the law. This is in direct contrast to the view of law as being autonomous and separate from social life, as is indicated by the judgment (see Fitzpatrick *op cit* at 119).

It is clear that although purporting to be neutral, the judgment expresses a very particular ideology of law and post-apartheid politics. In such an ideology, whites and blacks are equal members of the new society inaugurated by the ‘agreements’ that culminated in the adoption of the Constitution. Such an ideology allows whites to be seen uncritically as a vulnerable minority, while blacks are portrayed as the nefarious majority intent on killing whites. The politically charged nature of the case, as well as the historical roots of the song, are irrelevant in such an approach. The judge chose rather to reify the rights and the relationships that give those rights their context and value — choosing instead to give them a fixed and ‘objective’ meaning. These are some of the rhetorical ploys used by the judge in order to portray the law as neutral while in fact the judgment only serves the aim of appeasing the fears and concerns of whites and civilising blacks to develop a ‘new morality’. After all, as Patricia Williams reminds us, generally, statistically and corporeally, blacks as a group are poor, powerless, marginalised and excluded. ‘It is only in the minds of whites that Blacks become large, threatening, powerful, uncontrollable, ubiquitous, and supernatural.’ (Patricia Williams *The Alchemy of Race and Rights* (1991) 72.)

In the judgment, the massive social power held by whites was not taken into account, and nor were the widening inequalities and injustices experi-

enced by blacks (see M Ndletyana ‘Inequality is the real fuse for white fear’ *The Sunday Times: Review* 18 September 2011 at 4). It is to be expected that an apolitical posture which ignores the effects of unequal power relations will reach the conclusion that the song constitutes hate speech and promotes violence and hatred against whites. The problem with this posture is that it confuses whites as individuals and whites as a dominant and privileged category of people. Even if racial discrimination against whites could be established, it simply lacks the systemic, historical, institutional and even legislated character of anti-black racism. This notwithstanding however, there is still the unresolved problem of whether a *literal* interpretation of the song is acceptable — which I would argue it is not especially given the indeterminacy of both law and language.

Here CLS shows us that by ignoring the question of power and inequality, the true nature of institutionalised white supremacy is not only concealed, but also promoted and strengthened.

*Critical race theory: And we are not saved, again!*

The final stream of legal thought that needs to be considered in this note is, for obvious reasons, critical race theory. CRT grew out of the CLS movement and shares most — but not all — of its ideological tenets. Thus whereas a CLS approach would reveal particular ideological preferences and political predispositions, a CRT perspective seeks to expose the underlying racism and racial perspective inherent in such preferences and predispositions. Its basic presupposition is that law plays a role in race relations and racial politics and is complicit ‘in the violent perpetuation of a racially defined economic and social order’ (Costas Douzinas & Adam Gearey *Critical Jurisprudence* (2005) 259). In light of the strong CLS influence in its methodology of legal critique, one of the first basic tenets of CRT is the belief that, in racially structured polities or in a racially divided dispute, the law is incapable of race-neutral application (Charles W Mills *The Racial Contract* (1997)).

I would argue that, especially given our transformative post-apartheid context, to the extent that racial power and ideology is also reproduced in law and legal institutions and exercised ‘legally’, the law itself is an important site for the construction of that power and thus needs to be factored into legal inquiry (Kimberle Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) xiii). A common theme in CRT is to insist on a ‘black point of view’ in legal analysis (Williams *op cit* at 50). The need for this point of view is premised on the belief that modern legal consciousness has excluded the black experience(s) of life under law and thus operates according to standards which reinforce white normativity and treat the perspective of whites as the universal standard of legal analysis. This is linked to another theme of CRT — the critique of liberalism — which rejects the colour-blind approach that permeates equality jurisprudence and also emphasises the limitations of exclusively rights-based responses to racial injustice, discrimination and inequality. CRT departs from the liberal explanation of racism as an irratio-

nal, aberrational act committed by a conscious wrongdoer deviating from fair and impartial ways of treating fellow humans, distributing jobs, power, prestige and wealth (Richard Delgado 'Two ways to think about race: Reflections on the Id, the Ego, and other reformist theories of equal protection' (2001) 89 *Georgetown LJ* 2279). CRT scholars argue instead that racism should be seen as systemic and ingrained in the social culture and reinforced through political power and legal reasoning. The structural and ideological nature of racial power lies at the heart of the CRT critique of legal liberalism (Angela Harris 'Foreword' in Richard Delgado & Jean Stefancic *Critical Race Theory: An Introduction* (2001) xx).

The final theme in CRT relevant for my analysis is the notion of structural determinism, which is closely linked to the legal realists' exposition of the subjective nature of the value-structures that shape law and society. CRT focuses on the way in which the structure of legal thought and the prevailing legal culture determines its content and thus also who benefits from it and whose interests and values it protects and reflects. To this end, Klare's assertion that the South African legal culture (with specific reference to adjudication) is 'conservative' certainly explains Lamont J's reasoning and judgment (Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 157). For Klare, the South African legal culture is characterised by a 'relatively strong faith in the precision, determinacy and self-revealingness of words and texts. Legal interpretation in South Africa tends to be more highly structured, technicist, literal and rule-bound' (ibid at 168). The structural determinism thesis also reveals how deeply conventional ideas about race are embedded within the salient functioning of legal rules, and how they are often deployed to silence blacks or to stifle a deeper interrogation of the racial-ideological implications of a particular case. In South Africa, the choice for a colour-blind approach also has the result of not only making race irrelevant, but also of rendering the views and experiences of blacks irrelevant as well (Amy E Ansell 'Casting a blind eye: The ironic consequences of colour-blindness in South Africa and the United States' (2006) 32 *Critical Sociology* 333; Neil Gotanda 'A critique of "Our Constitution is colour-blind"' (1991) 44 *Stanford LR* 1). CRT is useful in exposing how Lamont J relied on the false belief that whites and blacks equally enjoy formal legal rights. On the basis of this false belief, it is easy to ignore that the true reality of racial discrimination in South Africa continues to subordinate, dehumanise and leave blacks in an inferior position.

This leads me to the question what a critical race theorist would say about the judge's refusal to take into account a 'black point of view' and choosing rather to accept as reasonable the meaning of the song as interpreted by whites? What is to be said about his choice to ignore the actual racial dynamics in South Africa by choosing to portray whites as a vulnerable minority? If indeed Afrikaner farmers are in danger of genocide, who is it that intends to commit that genocide? Is Lamont J suggesting that black people lack the moral agency or rationality to contextualise the song, and thus pose the very real threat of acting on its supposedly literal instruction to kill

whites? Apart from this being an implicit form of ‘court-sanctioned racial stereotyping’, it is also reflective of an old swart gevaar mentality which ‘continues to believe in a particular stereotype of [blacks], which defines [them] as immoral and amoral; savage; violent; disrespectful of private property; incapable of refinement through education; and driven by hereditary, dark satanic impulses’ (‘ANC submission to the Human Rights Commission hearings on racism in the media’ *ANC Online* (5 April 2000), available at <http://www.anc.org.za/show.php?id=2674>, accessed on 23 January 2012). See L Wiehl ‘Sounding black’ in the courtroom: Court-sanctioned racial stereotyping’ (2002) 18 *Harvard Blackletter LJ* 185).

One also experiences an uneasiness with Lamont J’s simplistic and essentialist division of whites and blacks into the categories of ‘minority’/‘majority’ and ‘target group’/‘other group’. His reference to ‘the public’ to denote the white Afrikaner community is problematic in the way that it subsumes all South Africans under banner of white Afrikaner interests — thus negating all forms of difference and plurality while simultaneously universalising the perspective of whites as the normative point of reference. That a marginal sector of the population is motivated by an irrational, self-centred and privatist fear in the myth of the marauding genocidal black masses is enough for Lamont J to conclude that there exists a persuasive public interest justification for the banning of the song. Here Judith Butler’s insights on the operation and effects of white paranoia must be recalled (‘Endangered/endangering: Schematic racism and white paranoia’ in Robert Gooding-Williams (ed) *Reading Rodney King/Reading Urban Uprising* (1993) 15–16):

‘If racism pervades white perception, structuring what can and cannot appear within the horizon of white perception, then to what extent does it [racism] interpret in advance “visual evidence”? And how, then, does such “evidence” have to be read, and read publicly, against the racist disposition of the visible which will prepare and achieve its own inverted perceptions under the rubric of “what is seen”?’

An unspoken outcome of the ruling that the song constitutes hate speech is invariably the view that the song is racist, and thus that blacks can be racist against whites. This in turn reveals the problematic liberal view of racism as merely the result of a prejudice, intolerance or purposeful malicious action based on a valorisation of racial categories. This failure to see racism as embedded within the historical and social practices of white culture and thus systemically located within all structures of power has the effect of charging blacks with racism despite the unequal social power held by whites. It also has the effect of confusing those who fight against racism with racists and also making white minority groups seem anti-racist when in fact their agenda is to protect white privilege at all costs through claims of ‘reverse discrimination’ — a trend referred to as ‘white backlash politics’ (Ansell *op cit* at 342). As Crenshaw et al (*op cit* at xiii) note (and see also Andile Mngxitama ‘Blacks can’t be racist’ (2009) 3 *New Frank Talk: Critical Essays on the Black Condition* 12):

‘In the construction of racism as the irrational and backward bias of believing that someone’s race is important . . . the cultural mainstream neatly linked the black left to the white racist right: according to this quickly coalesced consensus, because race consciousness characterized both white supremacists and black nationalists, it followed that both were racists.’

By implying that blacks can be racist, Lamont J failed to realise that speech perceived to be racially derogatory to whites does not rely on or reinforce a system of white racial subordination — simply because such a system does not exist. Conversely, given the historical and social prevalence of *black* racial subordination, the same is not true in the case of racially demeaning acts and statements directed towards blacks (See Mari J Matsuda, Charles R Lawrence III, Richard Delgado & Kimberle Williams Crenshaw (eds) *Words That Wound: Critical Race Theory, Assaultive Speech, And The First Amendment* (1993)). The deeply denialist and individualist view of race espoused by the judgment is then compounded by the paternalistic attempt at civilising in the judge’s remark that blacks who sing the song should ‘pursue new ideals and find a new morality’. But exactly what do these ‘new ideals’ and this ‘new morality’ entail? As I understand Lamont J, this new morality demands that blacks stop singing songs which whites may perceive as hurtful to them or as inciting physical harms against them. These ‘new ideals’ in turn impel blacks to use other means of reflecting on the collective disadvantage, daily discrimination and suffering that they experience since they can no longer openly name white supremacy as being instrumental in their suffering and whites as beneficiaries of that suffering. They should not sing songs which in any way suggest dissatisfaction with the post-apartheid state because as Lamont J notes ‘times have changed’ and the ‘enemy has become the brother’. This results in all forms of struggle and political dissent being negated by the need to develop a new morality which correlates with the prevailing middle-class culture of South Africans who experience easy living in the ‘new’ South Africa.

A critical race theorist would be critical of this judgment for embracing a conception of law in which laws on racial discrimination first exist outside of current social arrangements and power relations, and secondly where the dominant social culture (whiteness) informs rationality and determines what constitutes morality. The critical race theorist would criticise the judge for not challenging racial stereotypes and for following the ‘typical [modes] of analysis used by white scholars, practitioners and judges in their legal analysis of the race problem’ (Gary Minda *Postmodern Legal Movements* (1995) 169). Why, the critical race theorist would ask, did the judge not take into account the fact that the structural determinism of the South African legal system is still rooted in legal concepts that naturally privilege a white perspective? In other words, why was the judge not race-conscious? Yet even with all these critiques and questions, the critical race theorist would not be surprised at all by this judgment:

‘Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary “peaks of

progress,” short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies.’ (Derrick Bell *Faces at the Bottom of the Well: the Permanence of Racism* (1993) 12.)

#### A BILL OF WHITES?

In *The Strange Alchemy of Life and Law* (2009), former Constitutional Court Justice Albie Sachs (at 165) recounts an encounter he had while in exile with a group of black students which illuminates the uneasy tension between race and rights, and between race, racism and the law:

‘A group of black law students at the University of Natal-Durban established a body called the Anti-Bill of Rights Committee. I was shocked: What!?! Not Anti-Apartheid, but Anti-Bill of Rights!!! I was jolted by the notion of idealistic persons belonging to the oppressed community, part of the struggle for a non-racial democracy, being opposed to the idea of a Bill of Rights. Yet I sympathised with much of their motivation. Some called it “A Bill of Whites”, seeing it as a document established in advance by a privileged white minority to block any future moves towards social and economic transformation. Their fear was that the Bill of Rights would defend the unjust socio-economic situation created by apartheid, guarantee property rights in terms of which whites owned 87% of the land and 95% of productive capital, and impose extreme limits on the capacity of the democratic state to equalize access to wealth. Ultimately, the poor would remain poor, albeit formally liberated, and rich would get richer, though technically not advantaged.’

The judgment of Lamont J adds impetus to the view that the students may have correctly predicted that the new legal order in post-1994 South Africa would inaugurate a bill of rights and legal order that would protect and defend the interests and values of whites while forgetting the dark history (and presence) of racism, exploitation and oppression suffered by blacks that gave rise to its need in the first place. This judgment is not only poor because of its unreflective, conservative and alarmist reading of the Equality Act, but also because of its insensitivity to the true racial experience in South Africa and its failure to concede the inability of legal rules to be determinate, neutral and objective. The sensational language used, the conservative appropriation of ubuntu, together with the empty and coercive reconciliation and nation-building rhetoric employed and the colour-blind reading of the Constitution and Equality Act that run through the judgment appear, in my view, to elaborate the interests of whites through an unconscious rhetorical appeal to, and reliance on, a reactionary neoconservative racial politics clothed in the formal language of law.

Of course, a cogent point here is that the respondents did not raise many of these arguments (see eg the defences provided for in s 12 of the Equality Act) and that this matter should have never landed up in court in the first place. But the fact that it did, and ultimately benefited whites is telling of a major problem faced by equality jurisprudence in South Africa — that of racially and socially privileged white people bringing applications of unfair racial

discrimination to oppose measures of redress aimed at benefiting the previously (and currently) disadvantaged black majority. Anton Kok notes that the ‘equality jurisprudence produced by the South African Constitutional Court had to be developed with largely the “wrong” kind of claimants’ (‘The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislature-driven societal transformation?’ (2008) 19 *Stellenbosch LR* 131–2). He refers to *Pretoria City Council v Walker* (1998 (3) BCLR 257 (CC)) as a case where a privileged white man brought a claim of racial discrimination and *Minister of Finance v Van Heerden* (2004 (6) SA 121 (CC)) as the first affirmative action claim brought, also ironically, by ‘old order’ parliamentarians. The people for whom the anti-discrimination legislation was intended for — blacks — are not the ones to bring the claims generally because they cannot afford the expensive litigation involved or, more alarmingly, because they frequently experience that discrimination as part of normal, everyday life. To them, the law remains a tool to be used by whites in order to maintain their hegemony and social power while blacks — the true victims of a slow politico-ideological genocide — are left with no recourse to the law.

## CONCLUSION/POSTSCRIPT: THE END OF THE ROAD

‘A vision of cultural homogeneity that seeks to deflect attention away from or even excuse the oppressive, dehumanizing impact of white supremacy on the lives of black people by suggesting black people are racist too indicates that the culture remains ignorant of what racism really is and how it works. It shows that people are in denial. Why is it so difficult for many white folks to understand that racism is oppressive not because white folks have prejudicial feelings about blacks (they could have such feelings and leave us alone) but because it is a system that promotes domination and subjugation? The prejudicial feelings some blacks may express about whites are in no way linked to a system of domination that affords us any power to coercively control the lives and well-being of white folks. That needs to be understood.’ (bell hooks *Killing Rage: Ending Racism* (1995) 154–5.)

Unavoidable delays in the publication of this note have allowed me to follow the developments subsequent to the Equality Court judgment which is the subject of this note. It would seem that we have reached the end of the road (at least with regards to this specific case) as on 30 October 2012 in the Supreme Court of Appeal (Case no: A.815/2011), the parties reached a settlement (mediation agreement) in terms of which the appellants, Mr Julius Malema and the ANC, agreed to withdraw their appeal against the Equality Court judgment.

The settlement, which now represents an order of the court replacing the Equality Court judgment by Lamont J, accepts the basic premises of that judgment, namely that the lyrics of the song *dhubula’ ibhuni* constitute hate speech, and also that the morality of the ‘new’ South Africa dictates that people should refrain from singing the song (para 2). However the settlement goes further. It states first that the parties ‘agree that it is crucial to mutually

recognize and respect the right of all communities to celebrate and protect their cultural heritage and freedom' and also that the parties recognise that certain words in certain struggle songs may be experienced as hurtful by members of minority communities' (para 3a–b).

It adds that in the interests of reconciliation, to 'avoid 'inter-community friction', and 'recognizing [that] the lyrics of certain struggle songs are often inspired by circumstances of a particular historical period of struggle which in certain circumstances may no longer be applicable', the ANC and Mr Malema commit to counsel their leadership structures and supporters to 'act with restraint to avoid the experience of hurt'. It also states that the parties commit to a dialogue on 'understanding' different 'cultural heritages and aspirations' as part of the broader aim of 'promoting a common South African heritage' (para 3d–e).

The main problem with these particular terms of the settlement apart from the obvious culturalisation and naturalisation of political differences they reflect, lies in the almost explicit assertion that the conditions of racism that were generated by colonialism and apartheid are '[no longer applicable]' thereby rendering any form of struggle against them unnecessary and anachronistic. Thus, the settlement follows a formalistic, celebratory, and post-racial conception of reconciliation which in effect denies the social reality of race (by pretending that it no longer exists, that we have moved past it) and erases issues of racial power and privilege from the broader conversation on transformation, reconciliation and nation-building. This reductive account of reconciliation (in which reconciliation basically means not hurting each other) then converges with the emphasis on the need to avoid causing 'hurt' to members of the 'minority communities' (that is, whites). Apart from papering over the obvious fact that whites in South Africa are a dominant minority that imposes its social power over blacks, this emphasis evinces a tacit acceptance and affirmation of reactionary political discourses based on notions of white innocence and victimhood. Discourses of white victimhood (and claims of 'reverse-racism') in social formations dominated by whites (such as South Africa) are well-known not simply for being ironic but also for functioning to perpetuate systems of white power and privilege by preventing white people from acknowledging their own racial identity as members of the dominant group and instead creating the myth that white people are the new targets of a 'race-war' launched by blacks and bonding whites into an endlessly conspiratorial and resentful racial politics (see generally Michelle Fine, Linda Powell, L Mun Wong (eds) *Off White: Readings on Race, Power, and Society* (1996); Ruth Frankenberg (ed), *Displacing Whiteness: Essays in Social and Cultural Criticism* (1997); Ashley Woody-Doane & Eduardo Bonilla-Silva (eds) *White-Out: The Continuing Significance of Racism* (2003)).

This shows that the idea of reconciliation adopted by the parties (and, by extension, Lamont J and the SCA) is not a mutual, shared, and dialogic process but actually a one-sided process with the needs, views, feelings and experiences of whites (now in the (dis)guise of a vulnerable minority) as the central concern. It is difficult to understand how, in our present context, it is

possible that reconciliation, nation-building and ubuntu, and the language of rights and equality, can so easily be discursively co-opted for the promotion of whiteness and the prioritisation of white interests. However it is not difficult to see what the social and political effects are. In the first place, the terms of the settlement distort the social reality of race in South Africa — a social reality that remains characterised by racial inequalities, black subordination, and white dominance. They dilute and undermine black people's historically unique belief that racism continues to play a specific role in their lives that is both real and persistent. And secondly, they legitimise the politics of white nationalist organisations, which in turn encourages a culture of race-denialism and colour-blindness with the effect of silencing radical demands for social justice, reparations and redress.

Here the very choice of the parties to negotiate privately and settle the case should be called into question. Indeed the choice for mediation and settlement privatises and individualises race; reduces a publicly contested and socially important question about race, rights and reconciliation and converts it into a matter for the political elite to resolve through closed-door deals. This continues a trend in South African public discourse of evading race and refusing to engage with the reality of racism as a deeply rooted and defining characteristic of South African society. Having said this, I must admit though that I cannot, in confidence, claim that had the matter been argued in court and decided by the judges of the SCA, a more progressive, race-critical outcome would necessarily have been achieved. Given their recent decision in *BoE Trust Limited NO & others* [2012] ZASCA 147, which illustrates the SCA's own predilection for conservative racial politics and colour-blind interpretations of the law, I suspect the SCA may have reached the same, if not perhaps a more retrogressive, conclusion.

My concerns about *Afriforum v Malema*, from the Equality Court judgment to the settlement and to the surrounding public responses, pertain to its implications for the development a post-apartheid critical race jurisprudence and for more critical approaches to race, racial identity and racial power in South Africa (See Joel M Modiri 'Towards a (post-) apartheid critical race jurisprudence: Divining our racial themes' (2012) 27 *SA Public Law* 229). However I am also concerned that the outcome of the case gives credence to the long-held belief among critical race theorists that 'progress in our effort to gain racial equality is so hard to achieve and so easy to lose — precisely because rights for blacks are always vulnerable to sacrifice to further the needs of whites' (Derrick Bell 'Racism is here to stay' (1991) 35 *Howard LJ* 83). In this vein, I am curious about the extent to which the evasion of a deeper understanding of race demonstrated in this case corresponds to a broader retreat from racial justice in South African legal and public discourse (See Kendall Thomas 'Racial justice' in Austin Sarat, Garth Bryant & Robert A Kagan (eds) *Looking Back at Law's Century* (2002) 78). Therefore we should problematise the presumption that the judgment (and the settlement which concretises it as the current legal position on the relationship between race, struggle songs, hate speech and reconciliation) represents a neutral, fair and

objective legal outcome. Instead we should see how, as I have shown, they are implicitly based on powerful and contested theories of law and the judicial function (formalism, positivism), of politics (liberalism) and of race (colour-blindness and post-racialism). While creating the impression of having settled the matter and closed the case, they actually leave us more unsettled and open many more unanswered questions.

While much more could be said of this issue, it can be concluded that the judgment, as well as the mediation agreement in the SCA, has serious repercussions for the struggle for racial justice and radical social change in South Africa. It is hoped that if a similar matter returns to them, the courts will be more reflective and measured in their judgment, more open to context and history and more aware of the racial, socio-economic and political dimensions of the case. I end off with Derrick Bell's call (*And We are Not Saved: The Elusive Quest for Racial Justice* (1989) 3) to those committed to true racial justice to use such setbacks as a moment of reflection:

'With the realization that racial equality has eluded us again, questions arise from the ashes of our expectations: How have we failed — and why? What does this failure mean — for black people and for whites? Where do we go from here? Should we redirect the quest for racial justice?'